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No. 06-1038

IN THE
Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

PETITIONER,

v.

COMMUNITIES FOR EQUITY, *ET AL.*,

RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF EQUITY IN ATHLETICS IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Equity in Athletics, Inc. ("EIA") is a nonprofit corporation dedicated to establishing and preserving equitable, broad-based athletic programs in secondary and postsecondary education.

ISSUE PRESENTED

As relevant to *amicus* EIA, this case presents two significant questions:

(1) Whether the implied private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1688 ("Title IX"), displaces or preempts a federal-court action under 42 U.S.C. §1983 for violations of the Equal Protection Clause of the Fourteenth Amendment?

(2) Whether CFE has established the intentional discrimination required to state a claim under Title IX and the Fourteenth Amendment?

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the petitioner has consented to the timely filing of all *amicus curiae* briefs in this matter, and the respondents have consented to EIA's timely filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

Communities for Equity and its co-plaintiffs (hereinafter, collectively "CFE") establish only that scheduling decisions by the Michigan High School Athletic Association ("MHSAA") and by its non-party school members have disparately impacted CFE, without the requisite proof on intentional discrimination. Consequently, the Sixth Circuit erred in upholding the district court decision without proof that MHSAA acted *because of* CFE's gender, rather than merely *in spite of* a disparate impact by gender. With the exception of the initial and non-actionable decision to sponsor gender-separate teams, the rational-basis test applies, and MHSAA readily meets that test.

Although EIA fully supports MHSAA on the merits, EIA respectfully submits that the Sixth Circuit correctly answered this Court's remand on the threshold issue of whether *Sea Clammers* preemption displaces Fourteenth Amendment claims under 42 U.S.C. §1983. Notwithstanding their disagreement on the threshold question's *answer*, EIA and MHSAA fully agree that it is imperative that this Court resolve the circuit split on this question.

By arguing that so-called safe harbors under an administrative "policy interpretation" somehow insulate otherwise-unconstitutional actions from judicial review and redress (Pet. at 27-28), MHSAA has it precisely backwards. At least where a Title IX claim differs from a Fourteenth Amendment claim, the Reconstruction-era statutes clearly allow plaintiffs to proceed. This nation did not fight a civil war and amend its Constitution so that Congress – much less federal bureaucrats – could impose or authorize unconstitutional treatment as a condition of federal funding.

FACTUAL BACKGROUND

Amicus curiae EIA adopts MHSAA's statement of the facts. Pet. at 2-10. In addition, EIA notes that Michigan sports sponsorship for boys lags behind sports sponsorship for girls in several sports played by both genders, including field hockey, volleyball, water polo, equestrian, and gymnastics. *See* National Federation of State High School Associations, *2005-06 High School Athletics Participation Survey,* at 10, 12, 13, 17 (2006) ("*National Federation Survey*").[2]

ARGUMENT

I. TITLE IX CANNOT PREEMPT A FOURTEENTH AMENDMENT CLAIM

MHSAA argues that this Court should resolve the circuit split on Title IX's *Sea Clammers* preemption of §1983 actions. EIA agrees that resolution is imperative, but disagrees with MHSAA's proposed resolution.

Where, as here, a court grants declaratory and equitable relief against conduct for violations of both Title IX and the Fourteenth Amendment, none of the rationales for (or against) preempting an Equal Protection claim under §1983 apply with particular force. Unlike *Sea Clammers,* such cases do not present instances where a specific statute trumps the more ephemeral federal common law. *Middlesex*

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[2] The National Federation Survey is available online at http://www.nfhs.org/core/contentmanager/uploads/2005_06NFHSparticipationsurvey.pdf (last visited Feb. 28, 2007).

County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 21-22 (1981). Indeed, Title IX provides essentially the same protection from intentional discrimination and essentially the same relief as §1983 and the Fourteenth Amendment.[3]

Similarly, both Title IX and §1983 actions proceed straight to district court, without administrative exhaustion. *Cannon v. Univ. of Chicago,* 441 U.S. 694, 706-08 (1979); *Smith v. Robinson,* 468 U.S. 992, 1012 & n.14 (1984). Accordingly, unlike *Robinson,* such cases do not present instances where foregoing a statutorily contemplated administrative process short circuits a process that Congress intended to proceed. *Robinson,* 468 U.S. at 1012-13.

In cases such as this, perhaps the best reason for a court to decline constitutional relief under §1983 is that statutory relief under Title IX renders constitutional analysis

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[3] MHSAA's argues that Congress would not have intended §1983's punitive damages to apply to Title IX actions. *See* Pet. at 27. When a state actor violates both Title IX and the Fourteenth Amendment, however, it is difficult to imagine that Congress would have intended its federal funding to somehow provide the federal recipient a "free pass" from otherwise-applicable punitive damages. As to its related argument that such damages should not apply where a recipient complies with Title IX (or at least its regulations), but violates the Fourteenth Amendment, Pet. at 27-28, the "Nuremburg defense" has no place in American law. That said, federal courts retain considerable discretion to decline punitive damages when a state actor relies in good faith on a statutory or regulatory safe harbor that the court finds unconstitutional.

unnecessary. But where a state actor may forego future federal funds to continue its unlawful discrimination, a court reasonably could rule under both Title IX and the Fourteenth Amendment.

As MHSAA suggests in its petition, the best reason to resolve the circuit split is to address those instances where a recipient that ostensibly *complies* with Title IX nonetheless *violates* the Fourteenth Amendment. Pet. at 27-28 (citing so-called safe harbors issued by federal agencies). MHSAA's concern is reasonable: schools understandably want safe harbors to provide safety. MHSAA's example suggests that a state school that intentionally shortchanges its female athletes *because they are girls* nevertheless should escape liability because it *partially* redressed the intentional disparity in a manner sufficient to qualify as a history (however glacial) of program expansion for girls. Pet. at 27-28. While an agency may elect not to enforce a matter within its discretion, it seems doubtful that Congress intended agency action or inaction under 20 U.S.C. §1682 to insulate statutory violations of 20 U.S.C. §1681(a) from judicial review and redress.

Similarly, the current Title IX guidance under this purported safe harbor allows schools to disparately "cap" men's teams, solely to equalize their participation rates down to their enrollment rates. *See, e.g., Neal v. Board of Trustees,* 198 F.3d 763, 765-66 (9th Cir. 1999). As "outright... balancing," that is "patently unconstitutional." *Grutter v. Bollinger,* 539 U.S. 306, 330 (2003). More remarkable than its patent unconstitutionality and more relevant for the issue before this Court, the federal agency in question has not even considered the constitutional issues presented by its own alleged safe harbor:

> [The Department of Education's Office of Civil Rights] does not enforce the Fourteenth Amendment to the U.S. Constitution. Furthermore, because the scope of the Equal Protection Clause of the Fourteenth Amendment may differ from the scope of the Title IX statute, this Additional Clarification does not regulate or implement constitutional requirements or constitute advice about the Constitution.

U.S. Dep't of Educ., Office of Civil Rights, Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test — Part Three, at 1 n.1 (Mar. 17, 2005).[4] In sum, MHSAA's preemption argument would have this Court extinguish the Fourteenth Amendment because a bureaucrat, without much apparent thought, wrote a memorandum.

Notwithstanding its thoughtless unlawfulness, this policy interpretation routinely escapes judicial inquiry. *See, e.g., Kelley v. Board of Trustees,* 35 F.3d 265, 272 (7th Cir. 1994) (plaintiffs' attempted challenge to school's attempt to comply with requirements of safe harbor was impermissible "collateral attack"); *Miami University Wrestling Club v. Miami University,* 302 F.3d 608, 614 (6th Cir. 2002) (same). Neither this Court's jurisprudence nor even Congress' authority prevents federal courts' reaching constitutional issues in cases over which the federal court has jurisdiction. *Robinson,* 468 U.S. at 1012 n.15. For that reason, this

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[4] This "Additional Clarification" is available online at: http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf (last visited Feb. 28, 2007).

Court's should soundly repudiate MHSAA's safe-harbor justification for §1983 preemption.

Where, as here, a federal civil-rights statute provides subject-matter jurisdiction and an independent cause of action for statutory violations, a federal court can reach the constitutional merits under §1983, under the federal Declaratory Judgment Act, or even under Michigan's declaratory judgment rule. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978); *Associated Builders & Contractors v. Dep't of Consumer & Industry Services Director*, 472 Mich. 117, 125, 693 N.W.2d 374 (2005). For although 28 U.S.C. §1343(4) and 42 U.S.C. §1988(a) do not elevate Michigan law to an independent federal cause of action, *Moor v. County of Alameda*, 411 U.S. 693, 700-04 (1973), they do allow federal courts to resort to state law, as necessary, to declare the law "not inconsistent with the Constitution... of the United States." 42 U.S.C. §1988(a).

II. MHSAA'S SCHEDULING IS NOT INTENTIONAL DISCRIMINATION

Whether or not the Court finds §1983 to provide a cause of action, this Court can and should take up the merits of both CFE's Title IX and Fourteenth Amendment claims.

A. CFE's Causes of Action Require Intentional Discrimination, Not Mere Disparate Effect

Under both the Fourteenth Amendment and Title IX, intentional discrimination (*i.e.*, discrimination based on gender) means those actions where "the decisionmaker... selected or reaffirmed a particular course of action at least in part *'because of,'* not merely *'in spite of,'* its adverse effects

upon an identifiable group." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979) (footnote and citations omitted, emphasis added); *Alexander v. Sandoval,* 532 U.S. 275, 282 & n.2 (2001) ("it is absurd to think that *Cannon* meant, without discussion, to ban under Title IX the very disparate-impact discrimination that *Bakke* said Title VI permitted"). As MHSAA argues, CFE did not establish intentional discrimination.

This Court frequently relies on Title VII precedents where applicable to its Title IX jurisprudence, *e.g., Davis v. Monroe County Board of Education,* 526 U.S. 629, 640 (1999) (*citing Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 82 (1998) *and Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986)), and this Court should do so here. Under those precedents, not all disparate treatment is disparate treatment *because of gender,* just as not all harassment is *sexual* harassment.

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "*discriminat[ion]*... because of... sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Oncale, 523 U.S. at 81 (emphasis and ellipses in original, citations omitted). Likewise, the crucial issue for Title IX (or Title VI) is the statutory text, which prohibits all

discrimination *because of gender* (or race), but not all discrimination. If the manifest sexual abuse in *Oncale* nonetheless required a showing that it "actually constituted "*discrimina[tion]*... because of... sex," 523 U.S. at 81 (emphasis and ellipses in original) under Commerce-Clause and Fourteenth-Amendment legislation like Title VII, then there is no question that the failure to satisfy the "because of gender" requirement is dispositive under Spending-Clause legislation like Title IX.[5] *See also Franklin v. Gwinnett County Pub. Schools,* 503 U.S. 60, 74 (1992) ("when a supervisor sexually harasses a subordinate *because of the subordinate's sex,* that supervisor 'discriminate[s]' on the basis of sex" under Title IX) (emphasis added).

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[5] Title VI's legislative history could not state more clearly that Congress adopted Title VI *solely* under the Spending Clause. 110 Cong. Rec. 1527 (1964) ("Title VI is not an exercise of regulatory authority over activities within the States... and its validity rests on the power of Congress to fix the terms on which Federal funds will be made available") (prepared analysis submitted by Rep. Celler when introducing his bill to the House); *see also* 110 Cong. Rec. 6546 ("[Title VI] is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed'") (Sen. Humphrey, *quoting Oklahoma v. Civil Service Commission,* 330 U.S. 127, 143 (1947)). Nothing in Title IX's legislative history distinguishes it from Title VI in this regard. *Davis v. Monroe County Board of Education,* 526 U.S. 629, 637 (1999) ("Title IX was passed pursuant to Congress' legislative authority under the Constitution's Spending Clause"); *id.* at 640 (collecting cases).

B. MHSAA's Scheduling Decisions Do Not Constitute Intentional Discrimination

Gender does not drive MHSAA's scheduling of post-season tournaments for particular sports. As such, CFE's perceived injuries do not amount to statutory or constitutional violations. *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies... that the decisionmaker... selected or reaffirmed a particular course of action at least in part *'because of,'* not merely *'in spite of,'* its adverse effects upon an identifiable group") (footnote and citations omitted, emphasis added). At any rate, intermediate scrutiny does not apply to scheduling decisions formed under gender-neutral criteria. *Harris v. McRae,* 448 U.S. 297, 322 (1980) (rational-basis test applies to restrictions on abortion funding). For example, the decision to hold the girls' basketball tournament in the fall and the boys' basketball tournament in the winter does not flow from a single decision to disadvantage girls and to advantage boys. Instead, it flows from three distinct decisions:

1. *Separate Teams:* the decision to sponsor separate boys and girls basketball teams to enable girls to have a chance to participate;

2. *Separate Seasons:* the decision to sponsor those separate teams in separate seasons to allow more teams and more athletes to use the same limited facilities during the course of an academic year; and

3. *Seasonal Allocation:* the decision to schedule new sport seasons around existing team seasons when a new sport is added.

Of these three decisions, only the first qualifies as taken *because of* gender. The second and third undoubtedly have disparate effects on girls and boys in Michigan, but those decisions were taken *in spite of* those effects. To analyze the legal effect of, and the level of judicial scrutiny applicable to, each decision, EIA considers them *seriatim,* then analyzes their collective impact on CFE's federal claims.

1. Separate Teams

No-one seriously disputes the wisdom of schools' sponsoring gender-separate teams. Without gender-separate teams, girls would have little chance to compete in most sports:

> Sport is basically a strength, speed and reaction time activity involving propelling a mass through space or overcoming the resistance of a mass. Physiologically and anatomically you cannot compare highly skilled male and female athletes on these parameters because of the inherent biological differences between the sexes. Men are stronger, faster, have better reaction time and more muscle tissue per unit of body mass. That is why athletic teams and competition are sex separate.

Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association, 558 F.Supp. 487, 496 (D.D.C. 1983) (quoting CFE's expert, Dr. Donna Lopiano), *aff'd* 735 F.2d 577 (D.C. Cir. 1984); *accord Cape v. Tennessee Secondary Sch. Athletic Ass'n,* 563 F.2d 793, 795 (6th Cir.1977) ("It takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation").

Accordingly, the original Title IX regulations allow gender-separate teams, 40 Fed. Reg. 24,128, 24,142-43 (1975) (codified at 45 C.F.R. §86.41(b)); *accord* 34 C.F.R. §106.41(b), notwithstanding the gender-blind nature of that statute. 20 U.S.C. §1681(a). Because athletic competition brings a variety of unquestionably valuable lessons, skills, and other educational benefits to all students, teams separated *because of* gender satisfy the intermediate scrutiny applicable to intentionally gender-based distinctions: namely, that the "the [challenged] classification serves 'important governmental objectives' and that the discriminatory means employed are substantially related to the achievement of those objectives." *See United States v. Virginia,* 518 U.S. 515, 533 (1996). As the Sixth Circuit long ago recognized, without gender-separated teams, girls essentially could not participate in athletics. *Cape,* 563 F.2d at 795.

2. Separate Seasons

Having decided to sponsor gender-separate teams, schools rationally could decide to sponsor the same sports in different seasons to maximize the utility of limited facilities. For example, a single gymnasium goes further with boys and girls' basketball played in different seasons. Under this reasoning, schools do not make the separate-season decision *because of* gender. Standing alone, therefore, the decision to stagger separate seasons does not constitute *discrimination,* much less discrimination *because of gender. Feeney,* 442 U.S. at 279 (1979). But even if it did constitute discrimination, and notwithstanding any disparate impact by gender, schools could justify their actions under the rational-basis test:

> It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective."

McRae, 448 U.S. at 322 (applying rational-basis test applies to restrictions on abortion funding). Under that test, MHSAA's members unquestionably have a significant interest in increasing the availability of their limited resources to their students, which separate seasons unquestionably serve.[6]

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[6] Assuming *arguendo* that schools' scheduling decisions constitute discrimination, MHSAA's tournament scheduling decisions nonetheless would not. MHSAA schedules its tournaments for the same reason that Willie Sutton robbed banks: "that's where the money is." Pamela S. Karlan, "Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel," 105 HARV. L. REV. 670, 683 (1992). Here, rather than money, MHSAA schedules its competitive tournaments where (or when) the competitors are. It would make little sense for MHSAA to schedule tournaments in seasons in which its members did not sponsor sports. As a matter of Michigan law, MHSAA has no official authority over its members' scheduling decisions. *Kirby v. Michigan High School Athletic Association*, 459 Mich. 23, 39 n.17 (1998).

3. Allocation of Seasons

As the district court and Sixth Circuit both recognized, CFE's major complaint concerns the relative allocation of gender-separate seasons between the gender-separate teams. As both courts recognized, however, "[b]oys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys program." *See* 178 F.Supp.2d at 815 (quoting MHSAA publication); 377 F.3d at 506 (same).

In essence, CFE claims a disparate-scheduling injury. Even ignoring MHSAA's rebuttal evidence, a gender-neutral "first-come, first-served" allocation rule simply does not discriminate *because of* gender in the allocation of sports seasons, regardless of any disparate impacts by gender. *Feeney,* 442 U.S. at 279 (preference for veterans not discrimination against women, notwithstanding that more than 98% of veterans were men[7]); *M.L.B. v. S.L.J.*, 519 U.S. 102, 126 (1996) (disproportionate impact, standing alone, does not prove intentional discrimination). Further, courts cannot presume intent merely because a disparate impact is the foreseeable consequence of particular action or inaction.[8]

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[7] Although she failed to state an equal-protection claim, Ms. Feeney nonetheless suffered significantly more disparate impacts under Massachusetts' veteran-preference statute than CFE has suffered under sports scheduling in Michigan. *See Feeney,* 442 U.S. at 260 (district court found that the "absolute preference afforded by Massachusetts to veterans has a *devastating impact* upon the employment opportunities of women") (emphasis added).

[8] At the extremes, a court can presume discriminatory intent where facially neutral criteria apply to "such an irrational object of

(Footnote cont'd on next page)

City of Mobile, Ala. v. Bolden, 446 U.S. 55, 71 (1980) (abrogated by statute on other grounds, as stated in *Chisom v. Roemer,* 501 U.S. 380, 393 (1991)).

With no reason even to suppose that MHSAA or its members would respond differently upon adding a new boys' sport, CFE's disparate-impact claim cannot rise to a constitutional violation. For example, although Michigan girls now play field hockey in the fall, there is no reason to assume that MHSAA or schools would place boys' field hockey in the advantageous fall and move the girls' season to a less advantageous season. In other words, the first-come, first-served allocation rule is gender neutral. Consequently, that allocation rule does not violate equal protection. *Feeney,* 442 U.S. at 279.

Assuming *arguendo* that the allocation rule warrants further judicial scrutiny, with no gender-based motivation, it nonetheless does not constitute "such an irrational" mode of scheduling a new sport as to qualify for strict or intermediate scrutiny. *See Bray,* 506 U.S. at 270. Instead, under the rational-basis test, *McRae,* 448 U.S. at 297, the first-come,

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(Footnote cont'd from previous page.)

disfavor" in which a particular class engages exclusively or predominantly. *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 270 (1993). Thus, for example, "[a] tax on wearing yarmulkes is a tax on Jews." *Id.* Given the number of sports played by both genders in which boys' opportunities lag behind those for girls (*e.g.,* field hockey, volleyball, water polo, equestrian, gymnastics), *National Federation Survey,* at 10, 12, 13, 17, first-in-time status does not rise to the level of an *irrational* method of *predominantly* disfavoring girls.

first-served rule avoids disrupting existing coaching and other contracts as well as other ties between schools, teams, leagues, venues, and other entities.

Significantly, whatever MHSAA's individual *school members* do on their own campuses, nothing *at the MHSAA level* precludes CFE from playing sports in its preferred seasons: MHSAA allows female athletes to compete on boys' teams. *See* MHSAA Reg. II, §15, Interp. 213 (prohibiting boys from playing on girls' teams, but not prohibiting girls from playing on boys' teams) (C.A.J.A. at 2004). With no MHSAA barrier to CFE's equal *opportunity* to compete,[9] MHSAA cannot inflict a *constitutional* or *statutory* equal-protection injury on CFE. *See Gratz v. Bollinger,* 539 U.S. 244, 262 (2003) ("injury... is the denial of equal treatment [from] imposition of the barrier, not the ultimate inability to obtain the benefit"); *Feeney,* 442 U.S. at 273 ("settled rule that the Fourteenth Amendment guarantees equal laws, not equal results"). Because CFE can compete on an equal footing with boys, MHSAA has not violated CFE's equal-protection rights.

That Title IX and the Constitution *allow* gender-separate teams does not mean that they *require* them. *Coalition for Economic Equity v. Wilson,* 122 F.3d 692, 709 (9th Cir. 1997) ("The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely

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[9] EIA recognizes that MHSAA's brief interprets the MHSAA rules to allow girls to participate on boys' teams only in the absence of a reciprocal girls' team. Pet. at 2 & n.1. On their face, the MHSAA rules include no such exception.

permits"). Instead, it is the *Title IX regulations* that, in some circumstances, require recipients of federal education funding to sponsor gender-separate teams. The Sixth Circuit's *Horner* litigation recognized as much: namely, that the Equal Protection Clause protects against only actions taken because of gender, *Horner v. Kentucky High School Athletic Association,* 43 F.3d 265, 276 (6th Cir. 1995), whereas the Title IX regulations overlay an affirmative "equal opportunity mandate," *Horner v. Kentucky High School Athletic Association,* 206 F.3d 685, 694 (6th Cir. 2000). This distinction between the constitutional (and statutory) protection from intentional discrimination and the regulatory, groupwide equal-opportunity mandate is critical to understanding why CFE lacks a federal claim.

Assuming *arguendo* that its scheduling violates the intentional-discrimination standard, MHSAA nonetheless *lawfully* could collapse all gender-separate teams into combined-gender teams, thereby curing the violation but precluding most if not all CFE's members from participating. Although doing so may violate the Title IX regulations, *Williams v. School Dist. of Bethlehem,* 998 F.2d 168, 175 (3rd Cir. 1993) (under Title IX regulations, "'Athletic opportunities' means real opportunities, not illusory ones"), CFE would have no *private* right to enforce the extra-statutory, groupwide mandates that the regulations impose *on recipients* of federal funding. *Alexander v. Sandoval,* 532 U.S. 275, 285-90 (2001) (regulatory requirements on federal recipients do not and cannot constitute the rights-creating language necessary to support an implied private right of action); *accord Gonzaga University v. Doe,* 536 U.S. 273, 286 (2002) (applying *Sandoval* rationale to §1983 actions); *Blessing v. Freestone,* 520 U.S. 337, 340 (1997) ("In order to seek redress through §1983,... a plaintiff must assert the

violation of a federal *right,* not merely a violation of federal *law*") (emphasis in original).

Simply put, CFE has no federal right to have its sports in the seasons it wants. While no-one advocates the elimination of gender-separate teams, the *lawfulness* of that course highlights that CFE's only remedies for its perceived disparate-impact injuries lie in administrative proceedings before the U.S. Department of Education and (possibly) in state-law proceedings in an appropriate state forum.

CONCLUSION

Nothing in Title IX or any other provision of law prevents this Court from reaching the merits under the Fourteenth Amendment. Because neither MHSAA nor its member schools discriminated against CFE *because of* gender by adding new girls' sports around existing boys' and girls' sports, moreover, CFE cannot establish intentional discrimination under either Title IX or the Fourteenth Amendment. To resolve the important issues inherent in each question presented, this Court should grant the writ of *certiorari.*

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Respectfully submitted,

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